

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE  
AT CHATTANOOGA

EDWARD MCKISSICK, )  
Petitioner, )  
v. ) Nos. 1:15-CR-80-HSM-CHS-1  
UNITED STATES OF AMERICA, ) 1:17-CV-7-HSM  
Respondent. )

**MEMORANDUM OPINION**

Before the Court is Petitioner's supplemented motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Docs. 33, 36]. In it, he challenges his career offender designation and sentence in light of the Supreme Court's decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Mathis v. United States*, 136 S. Ct. 2243 (2016), *Welch v. United States*, 136 S. Ct. 1257 (2016), and *Beckles v. United States*, No. 15-8544, 2017 WL 855781, at \*7 (U.S. March 6, 2017) [*Id.*; Doc. 34 (memorandum in support of original petition)]. The United States responded in opposition on March 15, 2017 [Doc. 38]. For the reasons below, Petitioner's supplemented § 2255 motion will be **DENIED** and **DISMISSED WITH PREJUDICE**.

**I. BACKGROUND**

On January 26, 2016, Petitioner pled guilty to Count Two of a three-count Indictment, charging him with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) [Doc. 15 ¶ 1]. In the plea agreement, the parties agreed that a term of 120 months' imprisonment would be appropriate for the offenses [*Id.* ¶ 6], and Petitioner knowingly and voluntarily waived the right to file any motions or pleadings pursuant to 28 U.S.C. § 2255 except for claims of ineffective assistance of counsel or prosecutorial misconduct [*Id.* ¶ 10(b)].

Based on prior drug convictions, the United States Probation Office deemed Petitioner to be a career offender under Section 4B1.1 of the United States Sentencing Guidelines with an advisory Guideline range of 151 to 188 months' imprisonment [Presentence Investigation Report (PSR) ¶¶ 22, 82]. Consistent with the plea agreement, this Court sentenced Petitioner to a term of 120 months' imprisonment on May 3, 2016 [Doc. 29]. Petitioner did not file a direct appeal.

On January 9, 2017, Petitioner filed the instant § 2255 petition challenging his career offender designation and sentence in light of the *Johnson*, *Mathis*, *Welch*, and *Beckles* decisions [Docs. 33, 34]. On February 8, 2017, he filed an amendment with additional analysis [Doc. 36].

## **II. STANDARD OF REVIEW**

The relief authorized by 28 U.S.C. § 2255 "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, a petitioner must demonstrate "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

## **III. ANALYSIS**

The supplemented petition articulates a single ground for relief, arguing that the cited Supreme Court decisions preclude categorization of his prior drug offenses as "serious drug offenses" for purposes of career offender enhancement and that, without those convictions, he is

entitled to vacatur of his sentence [Docs. 33, 34, 36].<sup>1</sup> The United States opposes relief in part because Petitioner waived the right to collaterally challenge his sentence in his plea [Doc. 38].

#### A. Waiver

It is well established that an informed and voluntary waiver of the right to collaterally attack a conviction and sentence is enforceable. *Watson v. United States*, 165 F.3d 486, 489 (6th Cir. 1999); *United States v. McGlivery*, 403 F.3d 361, 363 (6th Cir. 2005). The Sixth Circuit recently held that the same is true even where that waiver prevents a petitioner from challenging his base offense level or career offender enhancement based on the *Johnson* decision. *See In re Garner*, No. 16-1655, 2016 WL 6471761, at \*1–2 (6th Cir. Nov. 2, 2016) (denying leave to file a successive petition challenging career offender enhancement based on the *Johnson* decision where defendant voluntarily waived his right to raise collateral challenges).

“The Federal Rules of Criminal Procedure give the parties ample room to tailor plea agreements to different needs—whether they are the right to appeal, the right to benefit from

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<sup>1</sup> The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). The statute defines “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the “use-of-physical-force clause”); (2) “is burglary, arson, or extortion, involves the use of explosives” (the “enumerated-offense clause”); or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the “residual clause”). 18 U.S.C. § 924(e)(2)(B). It was this third clause—the residual clause—that the Supreme Court deemed unconstitutional in *Johnson*. 135 S. Ct. at 2563.

Section 4B1.1 enhances a defendant’s offense level if he or she qualifies as a “career offender,” i.e., adult defendant whose offense of conviction is a “crime of violence or controlled substance offense” and who has “at least two prior felony convictions of either a crime of violence or a controlled substance offense.” U.S. Sentencing Manual § 4B1.1(a). “Crime of violence” under the Guidelines is defined in an almost identical manner as “violent felony” under the ACCA. *See* U.S. Sentencing Manual § 4B1.2(a) (adopting identical use-of-force and residual clauses as well as a nearly identical enumerated-offense clause).

future changes in the law or other concerns that the defendant . . . may have.” *United States v. Bradley*, 400 F.3d 459, 466 (6th Cir. 2005). For purposes of the instant case, Petitioner “knowingly and voluntarily” waived his right to collaterally challenge his sentence with the exception of cases which involve claims of ineffective assistance or prosecutorial misconduct [Doc. 15 ¶ 10(b)]. The fact that “developments in the law [have] expand[ed] [Petitioner’s forfeited] right [of collateral review] . . . does not suddenly make [his] plea involuntary or unknowing or otherwise undo its binding nature.” *United States v. McGlivery*, 403 F.3d 361, 363 (6th Cir. 2005). In light of the binding nature of Petitioner’s waiver, the instant § 2255 motion will be dismissed. *Accord United States v. Avery*, No. 3:16-cv-2, 2016 WL 7467967, at \*4–6 (S.D. Ohio Dec. 28, 2016) (denying *Johnson*-based challenge based on pre-*Johnson* waiver); *United States v. Strauss*, No. 16-cv-11397, 2016 WL 68733398, at \*2–3 (E.D. Mich. Nov. 2, 2016) (same); *United States v. Muller*, No. 16-cv-20009, 2016 WL 6892268, at \*2–3 (E.D. Mich. Nov. 2, 2016) (same).<sup>2</sup>

## **B. Merits of *Johnson*-Based Guideline Challenge**

Even if the waiver contained in the plea agreement did not bar Petitioner’s challenge, it would fail as a matter of law. On March 6, 2016, the Supreme Court held that the United States

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<sup>2</sup> While this Court recognizes that courts within this district have repeatedly stated that it is “far from clear” that waiver of the right to collaterally challenge a sentence can be enforced to bar challenges based on the *Johnson* decision, *Mefford v. United States*, No. 3:15-cv-575, 2016 WL 1737094, at \*1, n. 1 (E.D. Tenn. May 2, 2016); *Cox v. United States*, No. 3:15-cv-362, 2016 WL 552350, at \*1, n. 1 (E.D. Tenn. Feb. 10, 2016); *Nance v. United States*, 3:15-cv-387, 2016 WL 527193, at \*1, n. 1 (E.D. Tenn. Feb. 9, 2016), each of those cases alleged improper categorization under the ACCA. Unlike mistaken enhancement under the ACCA, improper career offender or base offense level enhancement does not result in a sentence “in excess of the maximum authorized by law.” *See, e.g., United States v. Thompson*, No. 3:06-cr-56, 2008 WL 6506506, at \*14 (W.D. Ky. Nov. 7, 2008) (explaining that knowing and voluntary waivers are enforceable so longs as they do not result in a miscarriage of justice and that a miscarriage of justice arises where the sentence imposed exceeds the statutory maximum permissible).

Sentencing Guidelines are “not amenable to vagueness challenges.” *Beckles*, 2017 WL 855781, at \*7. As a result, the *Johnson*, *Mathis*, and *Welch* decisions do not provide a basis for vacating, setting aside, or correcting Petitioner’s career offender designation.

#### IV. CONCLUSION

For the reasons discussed above, Petitioner’s supplemented § 2255 motion [Docs. 33, 36] will be **DENIED** and **DISMISSED WITH PREJUDICE**. The Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See* Rule 24 of the Federal Rules of Appellate Procedure. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

**ORDER ACCORDINGLY.**

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*/s/ Harry S. Mattice, Jr.*  
HARRY S. MATTICE, JR.  
UNITED STATES DISTRICT JUDGE